VIRGINIA LAW REGISTER

R. T. W. DUKE. JR., EDITOR.
FRANK MOORE AND JAMES F. MINOR, ASSOCIATE EDITORS.

Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

Amendments to the Code by the Last Legislature.

Ninety-five sections of the Code were amended at the last session of the Legislature and six repealed. The sections repealed were 873 and 874, relating to Reports of Superintendents of the Poor; §§ 2020, 2021 and 2022 in relation to Harbor Commissioners of Norfolk and Portsmouth, and § 44 of the Revenue Act. The following are the amended sections:

Section 58, in relation to representation in House of Delegates.

Section 70, in relation to pay of electoral boards.

Section 164, in relation to disabilities to hold office.

Section 437, in reference to appointment of assessors of lands and lots.

Section 437a, relating to assessment of lands and lots.

Section 441, in relation to standing timber.

Section 446, in reference to compensation of land assessors.

Section 448, in relation to number of commissioners of the revenue.

Sections 459 and 461, in relation to lists of deeds, etc.

Section 470, in relation to transfers of lands and standing timber.

Section 479, in relation to omitted lands.

Section 492b, in relation to collection of taxes and levies.

Section 525, in relation to fees of commissioners of the revenue.

Section 563, as to when licenses are payable into treasury.

Section 608, in relation to lists of property delinquent for taxes.

Section 614, in relation to compensation of county treasurers.

Section 655, in relation to deeds to purchasers of delinquent lands.

Section 753, in relation to state depositories.

Section 814, in reference to bonds of officers.

Section 815, in relation to bonds of city treasurers.

Section 834, in relation to powers and duties of board of supervisors.

Section 848, in relation to pay of supervisors.

Section 875, in relation to compensation of superintendent of the poor.

Section 890, in reference to sheriff of city of Richmond.

Section 891, in relation to appointment of coroner.

Section 925, in relation to care of courthouses, etc.

Section 1041a, in relation to assessments in cities and towns.

Sections 1104 and 1105, requiring foreign corporations to procure certificate from State Corporation Commission.

Sections 1164, 1168, 1169, 1170, and 1171, in relation to banks.

Section 1414, in relation to cemeteries.

Section 1438, in relation to salary of superintendent of schools.

Section 1463a, in relation to boundaries of school districts.

Section 1465, in relation to pay of clerks of district school boards.

Section 1466, in relation to duties of district school trustees.

Section 1483, in relation to donations to schools.

Section 1660, in relation to criminal insane.

Section 1669, in relation to proceedings before commission to ascertain insanity.

Section 1682, in relation to admission to hospitals for insane.

Section 1687, in relation to disposition of criminal insane.

Sections 1747 and 1750, in relation to practice of medicine and surgery.

Section 1752, regulating practice of medicine and surgery.

Section 1767, in relation to practice of dentistry.

Sections 1908, 1918, 1919, 1920 and 1923, in relation to weights, measures, sealers, etc.

Section 1957, in relation to pilots.

Sections 2008, 2009, 2016, 2018, 2019, 2023, 2024, 2026, 2027, and 2036, in relation to harbor commissioners of Norfolk and Portsmouth.

Sections 2070a and 2079, in relation to protection of game.

Section 2080, as to traps and seines in Accomac and Northampton.

Section 2086, in relation to fishing.

Section 2106, in relation to failure to pay fines prescribed by § 2105.

Section 2108, as to unlawful fishing.

Section 2191, in relation to unaltered horses and bulls.

Section 2219, as to how minister authorized to celebrate rites of marriage.

Section 2224, in reference to marriages.

Section 2229, in relation to marriage license.

Section 2357, in relation to correction of mistakes and obtaining inclusive grants for land.

Section 2494, in relation to liens on crops for advances.

Section 2719, in relation to recovery of rents.

Section 3057, in relation to judicial circuits.

Section 3059, in relation to terms of court.

Section 3059, in relation to term of circuit court.

Section 3140, in relation to exemption from jury service.

Section 3191, in relation to licensing attorneys.

Section 3319, in relation to appointment of commissioners in chancery.

Section 3370, in relation to interrogatories.

Section 3371, in relation to production of books, etc.

Section 3419, in relation to appointment of trustees.

Section 3528, in relation to fees of attorneys for the Commonwealth.

Section 3584, in relation to writs of possession.

Section 3792, in relation to fighting cocks, dogs, etc.

Section 3797, in relation to injury to hired horse.

Section 3801, relating to running trains on Sunday.

Section 3801, in relation to handling trains on Sunday.

Section 3938, in relation to duties of coroner.

Section 4020, in regard to juries for felony cases.

Section 4051, in relation to bail during suspension of sentence.

Section 4106, as to criminal jurisdiction of justices and police justices.

Few of these amendments affect the general body of the

"every day" law. One, the amendment to § 2224, was evidently made to fit a particular case—otherwise its necessity is not self-evident.

Sales in Bulk.

The Sales in Bulk Act, which avoids as against merchants' sales in bulk otherwise than in the regular course of business, unless notice, etc., is given to the various creditors of the seller, was attacked in the state of Michigan as an undue exercise of the police power and as denying due process or equal protection of the laws. The Michigan act is very similar to the Virginia act except in some unimportant details as to time, etc. The question went to the supreme Court of the United States in the case of Kidd, Dater & Price Company *v.* Musselman Grocery Company, decided May 16, 1910. The Supreme Court affirmed the decision of the lower court, holding the statute to be clearly within the police power of the state and as not repugnant to the Due Process Clause of the 14th Amendment.

Practically the same question was decided in Lemiaux *v.* Young, 211 U. S. 489, in which a similar act from the state of Connecticut was attacked and sustained by the Supreme Court. See, also, Boothe *v.* Illinois, 184 U. S. 425. The Michigan act affects wholesalers as well as retailers, whilst the Connecticut law applies simply to retail merchants.

Judges under Disability.

Justice Moody of the Supreme Court of the United States has been absent from his duties for some time. His health has been such as to necessitate such absence, and he has the sympathy of all well-thinking men. But there is no question that important public business has suffered whilst the distinguished Justice has been away from the bench. A bill has been favorably reported from both the Senate and House Judiciary Committees retiring him upon full pay. Of course Justice Moody's assent to the introduction of this bill is to be presumed, for there is no means by which a Justice of the Supreme Court

can be retired for physical or mental disability except with his consent. A Justice might absent himself if ill during as many years as he chose. He might become, within a week after his assumption of his duties, a hopeless lunatic. His salary runs on all the same whilst his duties are entirely neglected.

It does seem that some method should be devised by which a Judge appointed for life should be retired upon proof of the fact that he was physically or mentally unable to perform his duties. Provision should, of course, be made to take care of him. But no mere sentimental reason should stand in the way of his retirement.

There is today urgent need that the Supreme Court should have a full bench. Justice Moody's inability to sit, and Judge Brewer's death, has necessitated a reargument of three important cases—the Standard Oil, the Corporation Tax and the American Tobacco Company cases. In the second of these cases the importance of an early decision is apparent; large sums have been paid into the treasury, which, should the case be decided against the constitutionality of the Act, must be refunded, and a long and tedious wait and much loss will be caused. In addition to this delay, one cannot forbear from adverting to the fact that the Chief Justice and Mr. Justice Harlan are each 77 years of age. That they may live long every one wishes, but at that age nothing can be counted upon and there is a possibility that when the Court convenes in next October, there may be other vacancies and further delay. It is to be hoped that the bill retiring Justice Moody may be speedily passed and his successor appointed and confirmed before Congress adjourns.

Special Appearance.

In the case of Davis *v.* Cleveland C. C. & St. L. R. R., decided at the last term of the United States Supreme Court, 20 Sup. Ct. Reporter, p. 463, that tribunal held that a non-resident defendant over whom personal jurisdiction has not been obtained may appear specially in a suit in the Federal Circuit Court for the sole purpose of moving to quash the service

of writs of attachments and garnishment upon its property in the district on the ground that such property was not subject to attachment or garnishment.

In this case the executor of one Jandt brought an action against the railroad company in Iowa for damages done by it in the wrongful killing of the testator in Illinois. Certain cars of the company were attached and debts due to it by other railroads were garnisheed in the same state.

The company appeared, specially objecting to the jurisdiction of the Court on the ground that neither the cars nor debts due to it were liable to the process in Illinois, as they were both subjects of interstate commerce and therefore "immune from judicial process." The remarkable defense was also made that any accounts due the company by other companies were under an arrangement

> "by wheelage or mileage of such cars and were constantly and hourly changed from bills due one company to bills due the other company, which bills were satisfied and settled by such exchange of service and use of each other's cars and such agreements and contracts are to be discharged satisfied and settled only in the City of Chicago and State of Illinois, where the same are made, and such accounts or debts, if any in favor of this defendant, have no situs in the State of Iowa,"

and that therefore they were "as much a part of the interstate commerce as defined by the Supreme Court as the actual carriage of property." The lower United States Court actually took this view. In this Court the contention of Jandt's Executor was that the appearance of the railroad company was general and that any person over whom personal jurisdiction has not been obtained cannot appear specially to set aside the attachment of his property. Drake Attach., § 112, was quoted.

The Court very properly overruled this contention of the executor. It has been long settled in Virginia that an appearance on a motion to quash an attachment because of irregular execution of process is not an appearance to the action whereby its alleged defects are waived. Petty *v.* Frick Co., 86 Va. 503; Wynn *v.* Wyatt, 11 Leigh 584; Pulliam *v.* Aler, 15 Gratt. 62; Hilton *v.* Consumer's Car Co., 103 Va. 260.

In the case mentioned above a far more important point was decided and one upon which there has been a great conflict of authority, Illinois, Minnesota, South Carolina, Wisconsin and West Virginia holding that the cars of a non-resident railroad company could not be attached for a debt due or claimed to be due by the company in any state in which they are found outside of the company's domicil.

Interstate Commerce as against Obligations to Creditors.

New York, New Hampshire, Georgia and California have taken the contrary view, and in the case under comment the Supreme Court of the United States now throws the great weight of its authority with these latter States. In a very sane and clear opinion Mr. Justice McKenna, speaking for the whole Court, holds that such cars are liable to attachment.

> "Are the laws of the states for the enforcement of debts (laws which we need not stop to vindicate as necessary foundations of credit and because they give support to commerce, state and interstate) and the Federal laws which permit or enjoin continuity of transportation, so far incompatible that the provisions of the latter must be construed as displacing the former?"

he asks, and answers in the negative. He points out that the interstate commerce law and § 5258 of U. S. Revised Statutes are directed against acts of railroad companies which may prevent continuity of transportation and were not intended to relieve railroads from their obligation to creditors, or to take from those creditors any remedial process provided by the laws of the state. He concludes:

> "The interference with interstate commerce by the enforcement of attachment laws of a state must not be exaggerated. It can only be occasional and temporary. The obligations of a railroad company are tolerably certain and provision for them can be easily made. Their sudden assertion can be almost instantly met—at any rate after short delay and without much, if any, embarrassment to the continuity of transportation."

This has a sound, sensible ring about it, and states the proposition so clearly that there ought to be no doubt hereafter as to how such a case ought to be decided anywhere.

Cruel and Unusual Punishment.

The question of cruel and unusual punishment has come before the Supreme Court of the United States in more than one case, and the 8th Amendment to the Constitution prohibiting such cruel and unusual punishment has been passed upon oftener than most lawyers would think. It has recently been before the Court in the case of Weems *v.* United States, decided May 2d, 1910, in which the Court not only holds that the punishment was cruel and unusual but actually directs the proceedings to be dismissed and the prisoner discharged. It appears that Weems, a disbursing officer of the government in the Philippine Islands, falsified a public record by entering as paid out "as wages of the employees of the Light-house Government of the Philippine Islands at the Capul Light-house of 204 pesos, and for like service at the Mata Bridge Light-house of 408 pesos, Philippine currency," which entries were false, and for which false entries he was convicted under the law of the Philippine Penal Code. He was convicted and sentenced to fifteen years of Cadena (which in plain United States language is imprisonment) together with the accessories of 256 Penal Code, and to pay a fine of 4,000 pesetas. The punishment of Cadena carried with it hard and painful labor for the term of imprisonment, the accessories consisting of carrying during his imprisonment a chain at the ankle hanging from the wrist; to deprivation during the term of imprisonment of civic rights and to perpetual absolute disqualification to enjoy political rights, hold office, etc., and to the surveillance of the authorities during life. In addition to this the punishment of Cadena carried with it the prohibition of seeing any of his family or having any aid from the outside whilst in prison, to have no marital authority or parental rights or rights of property and no participation even in the family council.

The Philippine Bill of Rights possesses a clause similar to the 8th Amendment to our Constitution. The Court held that this punishment was cruel and unusual, dismissed the case and discharged the prisoner. No case has ever occurred before in the United States Supreme Court which has called for an exhaustive definition of the term "cruel and unusual punishment." It has been decided that the clause did not apply to State but to national

legislation. Purvear *v.* Massachusetts, 5 Wallace 475. It has been decided in Wilkerson *v.* Utah, 99 U. S. 130, that the infliction of the death penalty by shooting was not forbidden by the Constitution, and in this case the Court's final commentary was that difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted; and in In re Kemmler, 136 U. S. 436, it was said that punishments are cruel only when they involve torture or a lingering death. "The punishment of death is not cruel within the meaning of the word as used in the Constitution. It implies there something inhuman and barbarous—something more than the mere extinguishment of life." This was a case in which death by electrocution was held not to be cruel and unusual punishment. In O'Neal *v.* Vermont, 144 U. S. 323, the question was raised but not decided, three of the justices holding that the question was presented, and one of them—Mr. Justice Field—stating that the prohibition was directed not only against punishments which inflict torture, "but against *all* punishments which by their exhaustive length or severity are greatly disproportionate to the offense charged." The Court in the present case seems to have approved of this definition and states that even had the minimum penalty of the Cadena temporal, which was twelve years imprisonment with the aforesaid accessories, been imposed, it would have been repugnant to the Bill of Rights. The Court concludes: "In other words the fault is in the law; and as we are pointed to no other under which a sentence can be imposed, the judgment must be reversed, with directions to dismiss the proceedings." Mr. Justice White files a very learned and exhaustive dissenting opinion, in which Mr. Justice Holmes concurs. He quotes very many State decisions —Aldridge *v.* The Commonwealth, 2nd Virginia Cases 447, amongst them—bearing upon the question. His opinion is very well worth reading, but of course entirely too long for further quotation. He takes sharp issue with the Court on its dismissal of the prisoner, and his views on this point seem very sound.